

LEGAL CONSIDERATIONS ON THE ACCOUNTABILITY OF POLITICAL CLASS AND PUBLIC SERVANTS ¹

Dr Haluk Ferden Gursel ²

Abstract: Private citizens, eager for accountability, are asking for a transparency in the changes in income and assets/fortunes of politicians and high-level civil servants, accumulated while they are at the service of community. In almost each society in the world this suspicion prevails.

To satiate the appetite for accountability, in recent years a targeted verification system is redefined. The essentials of this 'new' system are not new at all. On the basis, the secret word is 'accountability'. It requires highly skilled account and finance experts to implement it appropriately. As all other similar instruments, it provides the expected results if the implementation is proper.

Keywords: Accountability, Asset/Income Disclosure, Conflict of Interest, Illicit Enrichment, Transparency.

(1) This article was inspired from a workpaper prepared for a Member Country of the United Nations while performing as Advisor to the Government.

(2) Consultant United Nations, Professional Content Provider for Policy Documents, E learning Training, gursel@yahoo.com

Introduction

Private citizens, eager for accountability, are asking for a transparency in the changes in income and assets/fortunes of politicians and high-level civil servants, accumulated while they are at the service of community. In almost each society in the world this suspicion prevails.

Public opinion does not tolerate the illicit enrichment and conflict of interest, while on duty. A strong proof is required to satisfy such potential displeasures of the people. Thus, to obtain assurances of lack of fraud and corruption by politically exposed persons (PEP) is on the rise everywhere. A PEP is defined as someone who, through their prominent position or influence, is more susceptible to being involved in bribery or corruption. In addition, any close business associate or family member of such a person will also be deemed as being a risk, and therefore could also be added to the PEP list. The view is that a favoritism which may be extended along these lines should be reviewed.

To satiate the appetite for accountability, in recent years a targeted verification system is redefined. The essentials of this 'new' system are not new at all. On the basis, the secret word is 'accountability'. It requires highly skilled account and finance experts to implement it appropriately. As all other similar instruments, it provides the expected results if the implementation is proper.

The practice created is called income-asset disclosure management scheme (IAD). This arrangement combats fraud and corruption, and entails more than monitoring of the declarations collected from the persons subject to statutory declarations. The term 'management' here covers all aspects of the procedure.

IAD systems can be a powerful tool to deter, prevent or detect fraud and corruption in public sector as well as private entities. Surely there might be some modification when it is applied to other than public sector. For example, such entities may not have the access to sensible, confidential information such as police records.

The expectation is that through this process, public confidence in the accountability of public servants is increased, perception of good governance improved. Along with the utilities to be derived from such schemes recently, multinationals or large-sized firms opted to approve the review plans with the same objectives.

Challenges

The basics of the implementation of the program necessitates the choice of right weight and a selection for example, between conflict of interest (COI) vs illicit enrichment, or set standards vs empirical rules, another choice need to be made on public availability of

information vs confidentiality/privacy of the citizens, or comprehensive vs targeted coverage of the persons subject to such declarations and so on.

Important aspect is that when such a system is established it should be a credible one that is accepted by the public it addresses. Otherwise, the competing systems will appear to fill the vacuum. For example, the news reporting, non-governmental organizations (NGO's), social media groups and others will task the same purposes of measuring the accountability of the public servants subject to such declarations, possibly with smaller and insufficient resources and likely arriving to the incorrect conclusions and measures.

In terms of establishing credibility another points to make is the fact that the expectations of what can be achieved with an IAD system may be met with mistrust and disbelief by the public opinion. Exaggerated statements about the ability of new programs to 'wipe out corruption' or 'zero corruption' can extinguish the good will prevailing with anti-corruption campaigns when such announces first made. Those who have lived through prior, unsustainable attempts claiming to reduce corrupt practices considerably, or to 'zero' level are likely now to doubt the efficacy of this new effort, and exaggerated expectations can crush any forward momentum to ongoing anti-corruption campaigns and may cause the failure of such efforts.

Leadership of the program is an integral part for the success of an IAD system. Politicians themselves and legislators can provide visionary leadership to drive the

introduction and development of a viable and sustainable IAD system. In this respect as a minimum, we may cite three principles, accountability, consistency and transparency should be respected.

Accountability is the responsibilities related the effective functioning of systems. Officials must be asked to demonstrate themselves their accountability to the public by participating in the IAD system without requesting any special treatment. Violations of procedures must be appropriately, swiftly penalized to send a message to the public that contravention of IAD standards will not be tolerated.

Consistency is in terms of the legal framework applicable to the program involves harmonization of laws and rules, then, there are no contradictions within the legislation.

Transparency property serves to demonstrate the accountability of governments, agencies, and officials. Laws and guidelines in the system should be made publicly available, clear and simple manner for scrutiny by civil society and for the ongoing education of declarants.

An additional challenge encountered for a successful implementation of the scheme is to consider the communication for combating resistance the program implementation and building buy-in the objectives and required procedures. Evidence from several countries shows that most officials' initial reaction to the idea is negative. They often view the process

as 'cumbersome' and 'unnecessary'. Communication about the purpose and benefits of IAD systems is, then, vital and unfortunately awareness raising for the necessity of such a program usually takes time. The purpose and functioning of the system must be effectively communicated to declarants and citizens to make them accept the purpose and related goals.

Approach

The contemporary approach agreed is risk-based. The review of the declarations collected is similar to the fraud risk assessment (FRA) and we know that with limited resources requiring to be effective, FRA may play a considerable role. Surely, the possible scenarios and related risks should be carefully defined and considered to be successful.

Thus, the officials deemed to be high-risk are reviewed in priority and access rights to the information on the high-risk officials as required should be recognized accordingly. In the practice, we note that in some countries, the access to the information and consequent results are severely limited by the authorities causing the failures to obtain expected results.

Outcome

The IAD systems deal with two major accountability issues:

First, in some jurisdictions, a focus on illicit enrichment might be considered preferable in contexts where perceptions of corruption and impunity (or perceptions thereof) are

high. In such cases, governments may prefer to adopt a model that focuses on monitoring officials' wealth, with the ultimate aim of detecting the concealment or theft of assets, and sanctioning violators through administrative or criminal sanctions, including heavy fines.

Second, in some other countries, rather than focusing on detection of wrongdoing, COI models are employed to concentrate on avoiding situations that may lead to unethical and eventually corrupt behavior. Jurisdictions benefiting a COI model often have effective systems in place for the criminalization and/or prosecution of corruption, as well as low levels of perceived corruption, though this is not always the case. Conflict of interest models can provide an ethics framework to guide officials in avoiding situations of COI. Communicating these objectives and training officials even before they assume their positions is very important and may be of help.

Country context

A major consideration of success in establishing the system would be finding right balance between public availability of information versus confidentiality.

Although 'citizen privacy' is accepted as a fundamental individual right in many jurisdictions, privacy rights extended to the levels too high, preventing the access to the main data and information ingredients necessary for the correct functioning of program, may hinder

the effectiveness of disclosure systems, particularly those that lack rigorous verification procedures and, therefore, to the extent that the necessary information withheld, depend all the more on public scrutiny for effective enforcement. This case obviously, at least is a failure of the program.

As a result, a successful disclosure framework faces the challenge of making sensible choices between enabling public scrutiny to assist in the fight corruption and protecting the privacy of those required to declare their wealth. In many contexts, concerns about invasion of privacy are coupled with officials' concerns about personal security.

As we noted, to be credible, a system should make clear precisely what information officials are required to declare, leaving no room for interpretation or distortion as to what constitutes a full and accurate disclosure. Most systems require a declaration of assets, income and liabilities. The importance of requiring disclosure of the source of assets and income in addition to their values may depend on whether the system is designed towards the prevention of COI or illicit enrichment. In case of COI, sources of income have greater significance. If the system favors more the detection of illicit enrichment, both asset and income values and sources are important.

In most cases, a periodic filing is necessary in order to monitor potential conflicts of interest and/or to track and to compare changes in assets over time. However, the designers should consider carefully the need for updated information vs overburdening the agency or

imposing unduly onerous obligations on public officials, an issue which consequently might lead to greater risk of noncompliance.

The critics of IAD systems often argue that corrupt officials can outsmart the scrutiny provided by financial disclosure systems. However, experience suggests that this is not necessarily the case! Individuals will often reveal illicit activity unintentionally or carelessly in their financial disclosures. Irregularities or inconsistencies within IAD forms can alert an experienced and properly trained reviewer to potential breaches of ethics or criminal behavior. Irregularities can appear within a single declaration form, or can result in discrepancies or conflicting data between declarations made over time. A careful in-depth review process can also reveal discrepancies between asset declarations and other sources of information on assets, such as property registries, tax declarations, bank accounts information and other similar databases.

Sanctions

Sanctions envisaged for the infringements of IADs may range from fines and administrative sanctions (such as reprimand, demotion, suspension from office, and dismissal) to criminal penalties.

When establishing a sanctions universe, how effectively the sanctions will be enforced should be considered by the developers of the system. A timely and consistent response to

filing failures can be more important than the severity of a sanction. Thus, the severity of sanctions needs to be weighted both to its enforceability and to its potential for deterring non-compliance. In other words, a prison term could be as ineffective as a small fine, if it is unlikely to be enforced.

Also, different categories of officials may require the use of different administrative sanctions. Members of Parliament, Ministers, and Heads of State cannot generally, be dismissed from office, reprimanded, or suspended from duty in the same manner as civil servants. A special set of issues applies in the cases, as they do with members of the Judiciary or other groups like military, police etc.

From an organizational perspective, linking employee compliance of filing timely declarations, to their supervisor's performance evaluation can add an additional pressure to the individual employees and encourage manager buy-in to the system. This logic can be stressed and can be leveraged by publishing results of compliance with filing the declarations. The increased deterrent effect of this approach is that it poses a direct threat to an official's career prospects and, depending on how salaries are set, to his/her earnings.

For criminal sanctions, in some countries, lying on an official document constitutes a criminal offense. Thus, it is vital that general deception laws sanctioning either lying on an asset disclosure or that a specific criminal sanction be provided for false statements on an asset disclosure.

Harboring the System

The disclosure (declaration filing system) needs to be “anchored” or harbored in a set of norms obligating public officials to behave in a certain manner. Such norms, in many jurisdictions, are commonly set out in criminal laws and/or in an ethics code/code of conduct. In some cases, a code of ethics/code of conduct has the benefit of avoiding some of the problems which may be caused by a strictly criminal approach. An ethics code/code of conduct can broaden the categories of unacceptable behavior that would not be covered under a strict criminal statute, e.g., favoritism like awarding contracts to brothers, cousins or close friends.

Conclusion

Contemporary concepts of accountability and transparency require each person controlling public funds be clear of any suspicion of corruption and fraud. The way to prove the absence of corruption is to establish a system of verification, also sanction those who are not complying with the given set of rules. IAD systems described in this article, with the proper implementation by specially trained specialists, like CPAs, CFEs, CGRCPs, CGFMs are designed to work towards such objectives.